Supreme Court, U.S.
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No. 05- 051410

IN THE

Supreme Court of the United States

EMMA RODRIGUEZ,

Petitioner,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, MARI CARMEN APONTE, MARCOS VILAR, MAIRYM RAMOS, & AIDA SANCHEZ,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) What level of sovereign immunity do U.S. territories possess to federal statutory liability?

(2) Does 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.") give Puerto Rico sovereign immunity for claims arising outside Puerto Rico?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT.	5
II. THE DECISION BELOW CONFLICTS WITH THE FIRST CIRCUIT.	6
III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT DECISION IN *NORTHERN INSURANCE COMPANY OF NEW YORK v. CHATHAM COUNTY, GEORGIA*.	8

Contents

Page

IV. THE NATURE OF PUERTO RICO'S SOVEREIGN IMMUNITY IS A RECURRING QUESTION OF IMPORTANCE. 9

V. THE DECISION BELOW IS WRONG IN EXPANDING § 734 TO GRANT SOVEREIGN IMMUNITY TO PUERTO RICO. 10

VI. THE DECISION BELOW DEFEATS CONGRESS'S EXPRESS DIRECTION THAT TERRITORIES SHOULD BE LIABLE TO EMPLOYEES FOR FLSA VIOLATIONS. ... 13

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases:

A.H. Phillips v. Walling, 524 U.S. 490 (1945) 14

Alden v. Maine, 527 U.S. 706 (1999) 3, 8, 11

Americana of Puerto Rico, Inc. v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *certiorari denied*, 386 U.S. 943 14

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960) 15

Austria v. Altmann, 541 U.S. 677, 124 S. Ct. 2240 (U.S. 2004) 9

Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) 10-11

Ezratty v. Puerto Rico, 648 F.2d 770 (1st Cir. 1981) 6

Fleming v. Department of Public Safety, 837 F.2d 401 (9th Cir. 1988) 5

Guillemard-Ginorio v. Contreras Gomez, 161 Fed. Appx. 24 (1st Cir. 2005) 6

Harris v. Rosario, 446 U.S. 651 (1980) 5, 14

Cited Authorities

Page

Herman v. Héctor I. Nieves Transport, Inc., 244 F.3d 32 (1st Cir. 2001) 13

Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 86 S. Ct. 737, 15 L. Ed. 2d 694 (1966) 15

Kimmel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 3, 13

Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi, 126 S. Ct. 1193 (U.S. 2006) 9

Norita v. Commonwealth of the Northern Mariana Islands, 331 F.3d 690 (9th Cir. 2003) 5

Northern Insurance Company of New York v. Chatham County, Georgia, __ S. Ct. __, 2006 WL 1071413 (U.S. 2006) 3, 8, 9, 16

People of Porto Rico v. Rosaly y Castillo, 227 U.S. 270 (1913) 3, 8

Powell v. U.S. Cartridge Co., 339 U.S. 497, 70 S. Ct. 755 (1950) 14

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 8

Ramirez v. P.R. Fire Serv., 715 F.2d 694 (1983) ... 6

Cited Authorities

Page

Redondo-Borges v. U.S. Dept. of Housing and Urban Development, 421 F.3d 1 (1st Cir. 2005) 6

Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority, 357 F.3d 124 (1st Cir. 2004) 6

Rivera v. Installation Club System, 623 F. Supp. 269 (D.PR 1985) 13

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 9

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 3, 8

Slakin v. Puerto Rico, 408 F.2d 682 (1st Cir. 1969) 6

United States v. Rosenwasser, 323 U.S. 360, 65 S. Ct. 295 (1945) 14

United States Constitution:

Amend. XI ..... *passim*

Cited Authorities

Page

Statutes:

29 U.S.C. § 203(c) 12, 13

29 U.S.C. § 203(e) 12, 13

29 U.S.C. § 206(a)(2) 13

29 U.S.C. § 207(a)(1) 12, 13

29 U.S.C. § 216(b) 13, 14

48 U.S.C. § 731 ..... 5, 14

48 U.S.C. § 734 ..... *passim*

48 U.S.C. § 1405(q) 11

48 U.S.C. § 1421b(u) 11

48 U.S.C. § 1421(c) 11

48 U.S.C. § 1421(n) 11

48 U.S.C. § 1421(q) 11

48 U.S.C. § 1421(q)(1) 11

48 U.S.C. § 1801 ..... 5, 11, 12

29 C.F.R. § 776.7(b) 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit Decided February 3, 2006 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The District Of Columbia Dated September 30, 2004 ..... 12a

OPINIONS BELOW

The opinion of the United State Court of Appeals for the District of Columbia Circuit is reported at *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006) (App. A). Upon accepting an interlocutory appeal from defendants, the Court of Appeals reversed the District of Columbia district court's September 30, 2004 decision which was reported at 338 F. Supp. 2d 125 (D.D.C. 2004) (App. B).

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was rendered on February 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI.

Suits Against States

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 48 United States Code, Section 734

Puerto Rico Federal Relations Act

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946 [22 U.S.C.A. § 1251 et seq.] or the Philippine Trade Agreement Revision Act of 1955 [22 U.S.C.A. § 1371 et seq.]: Provided, however, That after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.

STATEMENT OF THE CASE

Petitioner Rodriguez began working with the Respondent Puerto Rico Federal Affairs Administration ("PRFAA") as one of the "coordinators" of PRFAA's Voter Registration Project in New York City. The PRFAA is an executive agency of the Commonwealth of Puerto Rico ("Commonwealth") with offices in Washington, D.C. and New York. Individual respondents Aponte, Vilar, Ramos and Sanchez are supervisory employees of PRFAA, working in Washington, D.C. Plaintiff Rodriguez was a citizen of New York who worked for defendant in New York. Plaintiff Rodriguez was not paid overtime pay at the rate of time and one-half for her work as required by the Fair Labor Standards Act (FLSA). Ms. Rodriguez was terminated shortly after she complained to her superiors regarding the failure to properly pay her.

The Complaint alleging overtime, minimum wage and retaliation violations of the Fair Labor Standards Act ("FLSA") was filed on November 3, 2003 in the District of the District of Columbia. Puerto Rico moved to dismiss all claims under Fed. R. Civ. P. Rule 12(b)(1) claiming that the Commonwealth is entitled to sovereign immunity from suit based on a series of decisions in the First Circuit. The District Court for the District of Columbia found Puerto Rico did not possess constitutional "Eleventh Amendment" sovereign immunity. The Court of Appeals for the D.C. Circuit reversed, finding that Puerto Rico was immune from FLSA liability. The Court below held that 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.") incorporates Eleventh Amendment sovereign immunity to Puerto Rico to the same degree as the states.

This Court last directly addressed territorial sovereign immunity in 1913. *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). Since that time, this Court's sovereign immunity jurisprudence has evolved, with significant decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996), *Alden v. Maine*, 527 U.S. 706, 755 (1999), and *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). These decisions have defined the scope of Eleventh Amendment sovereign immunity for states to private citizen suits under federal statutes. The very recent decision in *Northern Insurance Company of New York v. Chatham County, Georgia*, __ U.S. __, 2006 WL 1071413 (U.S. 2006) has clarified that Eleventh Amendment sovereign immunity does not apply to entities other than states or arms of the state.

The Circuits have split on how to apply sovereign immunity to U.S. territories. The First Circuit finds that Puerto Rico is entitled to sovereign immunity directly under the Eleventh Amendment, the Ninth Circuit holds that the Commonwealth of the Northern Mariana Islands has no sovereign immunity to the FLSA, the D.C. Circuit below held that the Commonwealth of Puerto Rico has sovereign immunity to the FLSA, but under a statute it interpreted to require that Puerto Rico obtain the benefit of Eleventh Amendment sovereign immunity to the same degree as the states, even though it is not a state. 48 U.S.C. § 734.

This Court has clearly answered questions about the scope of sovereign immunity for States, subdivisions of States, and Indian tribes. Not so for the territories. Territorial sovereign immunity is an important area of sovereign immunity within the federal system remaining for this Court to address. The Circuits have not just split on the questions presented in this case, there is a compound fracture. There is significant confusion in the Courts of Appeals about the source and extent of sovereign immunity enjoyed by U.S. territories. The First, Ninth and D.C. Circuits have each come to a different conclusion as to how territories' sovereign immunity should be interpreted.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT.

The D.C. Circuit found that the Commonwealth of Puerto Rico[1] possesses sovereign immunity from private suit under the FLSA to the same degree as the States by virtue of the general statutory applicability clause of the Federal Relations Act (FRA), 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States."). The Ninth Circuit held directly to the contrary with respect to the Commonwealth of the Northern Mariana Islands (CNMI). The CNMI has a general statutory applicability clause functionally the same as § 734, but the Ninth Circuit has ruled that this clause does not incorporate Eleventh Amendment sovereign immunity for the CNMI. *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-6 (9th Cir. 1988); *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 693 (9th Cir. 2003). The language of that clause is no different in any relevant respect to the clause applicable to Puerto Rico.[2] The Ninth Circuit in *Norita*, *supra*,

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1. Puerto Rico is a "territory" of the United States. *See* 48 U.S.C. § 731 "Territory Included under Name Puerto Rico" *and see Harris v. Rosario*, 446 U.S. 651 (1980).

2. § 502 states that "laws of the United States shall generally be applicable to CNMI as they are applicable to the several states." *Norita*, 331 F.3d at 693. 48 U.S.C. § 1801. If anything, § 502 is broader, covering "laws" and not just "statutes," and by using the word "to" instead of "in" it clearly pertains to the Territory's liability as a party to litigation. For all purposes at issue here however, the clauses are the same.

held that the Commonwealth of the Northern Mariana Islands was not immune from FLSA liability as an employer, whereas the D.C. Circuit held that the Commonwealth of Puerto Rico is immune from FLSA liability as an employer. Thus the decision of the Court below conflicts with the Ninth Circuit Court of Appeals.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST CIRCUIT.

The First Circuit has a long history of finding that Puerto Rico has Eleventh Amendment sovereign immunity with little or no explanation. In *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694 (1983), for example, the First Circuit states "Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects." *See also Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.2 (1st Cir. 1981); *Slakin v. Puerto Rico*, 408 F.2d 682, 683 (1st Cir. 1969). The First Circuit continues to find Puerto Rico has Eleventh Amendment sovereign immunity. *Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority*, 357 F.3d 124, 125 n.1 (1st Cir. 2004); *See also Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1 (1st Cir. 2005); *Guillemard-Ginorio v. Contreras Gomez*, 161 Fed. Appx. 24 (1st Cir. 2005). As noted by the District Court below, the decisions in the First Circuit collectively offer no reasoning to support the decision to accord Puerto Rico Eleventh Amendment immunity.

The District Court below found that Puerto Rico does not possess constitutional sovereign immunity:

> What Congress giveth, Congress may take away, fully consistent with the Territory Clause of the Constitution: "The Congress shall have power to

> dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Constit. art. IV, § 3, cl. 2. *See also Harris*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (holding that under the Territory Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions"). There have been many changes since 1913 in Puerto Rico's status and the doctrine of sovereign immunity. However, defendants do not dispute the proposition that Congress has the power to abrogate any sovereign immunity that Puerto Rico may possess with regard to a Congressionally-created cause of action such as FLSA, and that it exercised that power when it amended the FLSA in 1974.

338 F. Supp. 2d at 128. The D.C. Circuit, in reversing, did not hold that Puerto Rico possesses Eleventh Amendment sovereign immunity, but effectively gave Puerto Rico immunity to the same degree afforded to states under § 734.[3]

The Circuit's decision below is in accord with the First Circuit's grant of immunity to Puerto Rico, however it effectively conflicts with the decisions in the First Circuit locating sovereign immunity for Puerto Rico directly in the

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3. The effect of this grant of sovereign immunity differs from what is afforded by the Eleventh Amendment directly, insofar as Eleventh Amendment immunity cannot be abrogated by Congressional action. However, the effect of the DC Circuit's decision turns FRA § 734 on its head: now instead of making U.S. statutes applicable to Puerto Rico automatically, Congress is required to state affirmatively that it intends to abrogate whatever sovereign immunity Puerto Rico may have.

Constitution. By finding the source of immunity to be conferred by Congress in FRA § 734, the Court below would seemingly permit Congress to abrogate the sovereign immunity of Puerto Rico. The First Circuit's locating Puerto Rico's sovereign immunity in the structure of the constitution (Eleventh Amendment immunity) would preclude Congress's ability to nullify Puerto Rico's immunity. *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT DECISION IN *NORTHERN INSURANCE COMPANY OF NEW YORK v. CHATHAM COUNTY, GEORGIA*.

This Court, in 1913 held that Puerto Rico has common law sovereign immunity in *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). Whether Puerto Rico had Eleventh Amendment immunity was a persistent question as Eleventh Amendment jurisprudence evolved. This Court recognized but declined to answer the question in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 fn.1 (1993). This Court has ruled however, that only States have Eleventh Amendment sovereign immunity. *See, e.g., Seminole Tribe, Alden, supra.* Subsequent to the decision below, this Court, in *Northern Insurance Company of New York v. Chatham County, Georgia*, __ U.S. __, 2006 WL 1071413 *4 (U.S. 2006) held that "A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that *only States and arms of the State possess immunity from suits authorized by federal law.*" (Emph. Added). The Court below and the First Circuit however, granted "immunity from suits authorized by federal law" to the Commonwealth of Puerto

Rico, even though it is not a state. Although this Court did not address territorial sovereign immunity in the decision in *Northern Insurance Company*, that decision strongly suggests the error of the Court below.

IV. THE NATURE OF PUERTO RICO'S SOVEREIGN IMMUNITY IS A RECURRING QUESTION OF IMPORTANCE.

The degree of sovereign immunity possessed by the territories is an important question — not just for the roughly four million citizens of Puerto Rico, and not just for the citizens of the other territories. In the increasingly interconnected union, the question of whether territorial governments may be sued, as here, by citizens outside the territories for territorial actions in the States, is also increasingly important. Whether Puerto Rico can claim the benefit of sovereign immunity, either under the Eleventh Amendment, or effectively to the same extent under § 734, is of great importance to the citizens of Puerto Rico dealing with their government and to all individuals within the U.S. who have dealings with Puerto Rico.

This Court has addressed many other major questions concerning the scope of sovereign immunity, having thoroughly addressed state immunity, county immunity, immunity for Indian tribes,[4] and foreign sovereign immunity.[5] The scope of territorial immunity is a missing piece from the sovereign immunity puzzle. While three Circuits have each attempted to supply the appropriate doctrinal basis and scope of territorial

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4. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

5. *See Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (U.S. 2004); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 126 S. Ct. 1193 (U.S. 2006).

immunity; none of the Circuits agree. Only this Court can clearly answer these important outstanding questions.

As discussed further below, the current split in the Circuits gives Congress no clear direction in how to make laws applicable to Puerto Rico. Under the Ninth Circuit's rule and the Territory Clause of the Constitution, Congress's authority to specify which laws apply to territories is plenary. The decision below would suggest Congress could make federal statutes applicable to Puerto Rico, provided it specifies that § 734 does not apply in each and every such statute. However, the decisions in the First Circuit suggest that any effort to make Puerto Rico liable would violate Puerto Rico's Eleventh Amendment immunity. This places Congress in an untenable bind – if it were to engage in the political entanglements necessary to specify which of the pre-existing statutes should apply to Puerto Rico, the First Circuit's Eleventh Amendment rulings would vitiate the result. Thus, only this Court's resolution of the questions presented in this petition can clarify which statutes are applicable to Puerto Rico and what steps Congress must take if it wishes to make Puerto Rico liable under federal statutes.

V. THE DECISION BELOW IS WRONG IN EXPANDING § 734 TO GRANT SOVEREIGN IMMUNITY TO PUERTO RICO.

The decision below wrongly interprets § 734. The decision of the D.C. Circuit affords Puerto Rico the same status as a state, even though it is not a state by misreading § 734. The clear purpose of § 734 was to make U.S. statutory law applicable in Puerto Rico, without requiring a specific Congressional declaration of applicability for each and every pre-existing or later-enacted statute. *Examining Bd. of*

Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 593 (1976). The decision below turns § 734 on its head, requiring an explicit declaration by Congress that Puerto Rico is liable to suit under every law that would otherwise be applicable in Puerto Rico.

Congress has repeatedly enacted general applicability clauses for territories as well as Indian tribes. *See* 48 U.S.C. § 1801 for CNMI, 48 U.S.C. § 734 for Puerto Rico, 48 U.S.C. §§ 1421b(u), 1421(c), 1421(n), and 1421(q) for Guam, 48 U.S.C. §§ 1405(q) and 1421(q)(1) for the Virgin Islands. *See also Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) (Congress confers authority to regulate certain Indian tribes by criminal law to certain states). None of these statutes have ever previously been interpreted to mean that a territory enjoys constitutional sovereign immunity. This Court has reviewed § 734 before but it has never held that the statute was meant to confer immunity on Puerto Rico, even when its status differs from the states under the Constitution. *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 593 (1976); *see also Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

Title 48 U.S.C. § 734 does not state its converse: laws inapplicable *in the states* are inapplicable in Puerto Rico. Nor does § 734 say that laws inapplicable *to* the states are inapplicable *to* Puerto Rico. Indeed, the FLSA is not inapplicable to the states, the states simply have a constitutional defense to private citizen suits for damages. *Alden, supra.* At most, the PRFRA holds that the FLSA *has* applicability in Puerto Rico as a statute applicable in the states (which is also what the FLSA itself states). The FLSA *is*

applicable in the states and Puerto Rico. But § 734 simply does not say that because states (as employer-defendants) have a Constitutional defense to individual claims in federal court under the FLSA, Puerto Rico gets the benefit of the same defenses, even though they would not get that benefit under the Constitution.

The D.C. Circuit's analysis puts Congress in an untenable position. Under the D.C. Circuit's analysis, Congress would be required to undertake a statute by statute review of which statutes should apply to Puerto Rico (though it has never had to do this for any other territory). However, by the First Circuit's decisions according Puerto Rico Eleventh Amendment immunity, any such specification is beyond Congress's power.

Furthermore, even if § 734 barred application of the FLSA to some extent in Puerto Rico, this case arose in New York, where plaintiff worked for the defendants. The language of § 734 is directed to what laws apply in Puerto Rico, not New York. Section 734 should not have been applied at all to this case because there is no question about the FLSA's applicability in New York.

The Court of Appeals wrongly expanded § 734 to one conferring on Puerto Rico the same constitutional defense from FLSA liability possessed by states. This strained reading of § 734 plainly expands the PRFRA well beyond its terms, beyond its clear purpose and to defeat the explicit directive of Congress that the Territories are liable to private citizens for violating the FLSA. 29 U.S.C. § 203(c), (e) and § 207(a)(1).

VI. THE DECISION BELOW DEFEATS CONGRESS'S EXPRESS DIRECTION THAT TERRITORIES SHOULD BE LIABLE TO EMPLOYEES FOR FLSA VIOLATIONS.

Congress made the FLSA applicable to employees in Puerto Rico. 29 U.S.C. 206(a)(2); *and see* 29 C.F.R. 776.7(b). The FLSA has long been applied in Puerto Rico and there is no doubt that the FLSA applies in Puerto Rico. *See, e.g., Herman v. Héctor I. Nieves Transport, Inc.*, 244 F.3d 32 (1st Cir. 2001) (FLSA applied in Puerto Rico). *See also Rivera v. Installation Club System*, 623 F. Supp. 269 (D.PR 1985) (FLSA applies to U.S. government defendants in Puerto Rico).

Congress clearly intended to abrogate Puerto Rico's sovereign immunity in the FLSA. This Court has already determined that Congress intended to abrogate the States' sovereign immunity in the same section that applies to Puerto Rico. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000) (29 U.S.C. § 216(b), applicable to FLSA and ADEA, intends to abrogate state immunity). The FLSA clearly intends private suits against governmental employers (including the territory of Puerto Rico) in abrogation of whatever sovereign immunity they possess.[6] Congress made Puerto Rico liable under the FLSA for overtime or other violations under the statute.

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6. Defendants did not dispute below that Congress intended an abrogation. Title 29 U.S.C. § 207(a)(1) makes employers liable for violations of the overtime law with respect to employees. 29 U.S.C. § 203(e) defines employees to include a variety of governmental employees, including federal, state, local and territorial government employees, with specific classes of such governmental employees exempted (not applicable here). Title 29 U.S.C. § 203(c) defines the term "State" to mean "any State of the United States or the District

(Cont'd)

Employees including the plaintiff are granted a private right of action against employers, including Puerto Rico, for violations of the FLSA under 29 U.S.C. § 216(b). Plaintiff is granted a private right of action against Puerto Rico. By applying § 734 to grant immunity to Puerto Rico from private suit, the decision below contravenes the important public purpose of the FLSA overtime and anti-retaliation protections. The Fair Labor Standards Act was designed,

> to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' ... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips v. Walling, 524 U.S. 490, 493 (1945); *Powell v. U.S. Cartridge Co.*, 339 US 497, 70 S. Ct. 755 (1950). *See also United States v. Rosenwasser*, 323 U.S. 360, 65 S. Ct. 295, 296 (1945) ("no doubt as to the Congressional

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(Cont'd)

of Columbia or any Territory or possession of the United States." Puerto Rico is a "territory" of the United States. *See* 48 U.S.C. § 731 "Territory Included under Name Puerto Rico" *and see Harris v. Rosario*, 446 U.S. 651 (1980); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966) ("Puerto Rico is a 'Territory' within the purview of Article IV, Section 3"), *certiorari denied*, 386 U.S. 943. Defendant admits that Congress intended to authorize private suits against public-employers such as the Commonwealth.

intention to include all employees within the scope of the Act unless specifically excluded.").

Exemptions from the Act's requirements are to be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960). The burden of proving these exemptions is upon the employer, and if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 86 S. Ct. 737, 747, 15 L. Ed. 2d 694 (1966).

Congress intended to make Puerto Rico liable under the FLSA. The decision below defeats Congress's clear intent by giving Puerto Rico an exemption to the FLSA.

CONCLUSION

The Court of Appeals' decision below conflicts with decisions in the Ninth and First Circuits as well as this Court's sovereign immunity jurisprudence. *See e.g. Northern Insurance Company of New York, supra.* Each Circuit has taken a different approach with respect to the sovereign immunity possessed by U.S. territories. This Petition for Certiorari should be granted so that this Court can resolve the confusion in the Circuits on the important question of the nature and extent of territorial sovereign immunity.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED FEBRUARY 3, 2006

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

Argued November 22, 2005 Decided February 3, 2006

No. 05-7029

EMMA RODRIGUEZ,
Individually and on Behalf of Others Similarly Situated,

Appellee

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION,
and Individual Defendants, *et al.*,

Appellants

UNITED STATES OF AMERICA,

Intervenor

Before: TATEL and GARLAND, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Appendix A

TATEL, *Circuit Judge*: The issue presented arises from the intersection of the Puerto Rican Federal Relations Act (FRA), the Fair Labor Standards Act (FLSA), and principles of state sovereign immunity as set forth in two Supreme Court decisions: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). Holding that Article I of the United States Constitution gives Congress no authority to abrogate State sovereign immunity, *Seminole Tribe* and *Alden* effectively invalidated the FLSA's private right of action as applied against state agencies. In this case, we must decide whether, despite those two decisions, the FLSA's private right of action still applies against an agency of the Puerto Rican government. Because FRA section 734 provides that "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States," and because *Seminole Tribe* and *Alden* have left the FLSA's private right of action without "force and effect" against state agencies "in the United States," we hold that it does not.

I.

Ending the Spanish American War, the 1899 Treaty of Paris ceded Puerto Rico to the United States as a territory entirely subject to Congress's regulatory will. Treaty of Paris, 30 Stat. 1754 (1899). According to the Treaty, "[t]he civil rights and political status of [Puerto Rico's] native inhabitants . . . shall be determined by the Congress." *Id.* at 1759. Moreover, Article IV of the Constitution authorizes Congress to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." *See* U.S. Const. art. IV, § 3, cl. 2.

Appendix A

In a series of statutes beginning with the Foraker Act of 1900 and culminating with the enactment of Public Law 600 in 1950, Congress granted Puerto Rico ever increasing self-governing authority. *See* Foraker Act, ch. 191, 31 Stat. 77 (1900) (establishing Puerto Rico's first civilian government and vesting it with executive, legislative, and judicial powers); Jones Act of 1917, ch. 145, 39 Stat. 951 (1917) (providing Puerto Rico with a wider degree of local self-government, establishing a territorial bill of rights, and conferring American citizenship on Puerto Rican citizens); Elective Governor Act, Pub.L. No. 80-362, 61 Stat. 770 (1947) (investing the People of Puerto Rico with full control over the executive branch); Act of July 3, Pub.L. No. 81-600, 64 Stat. 319 (1950). "[A]dopted in the nature of a compact," Public Law 600 authorized the People of Puerto Rico to "organize a government pursuant to a constitution of their own adoption." Act of July 3, Pub.L. No. 81-600, 64 Stat. 319 (1950). Through popular referendum, the People of Puerto Rico approved Public Law 600's proposed allocation of power—supreme national power to the U.S. Congress and full local control to the Puerto Rican government—and then adopted a draft constitution. Congress approved the constitution, subject to three amendments: two unrelated to the claim before us and one requiring any future amendments to be "consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact." H.R.J. Res. 430, 82nd Cong. (1952). The Constitutional Convention of Puerto Rico accepted the amendments and then ratified the

constitution "in the name of the people." *See id.* (outlining procedure for ratification); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594-95, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976) (noting Puerto Rico's acceptance of amendments and ratification of the constitution).

Public Law 600 included the Puerto Rican Federal Relations Act, Act of July 3, Pub.L. No. 81-600, § 4, 64 Stat. 319 (1950), which codified all earlier statutory provisions regarding Puerto Rico that survived the Compact, including the following language first drafted for the Foraker Act: "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734; *see* Jones Act of 1917, ch. 145, § 9, 39 Stat. 954 (1917) (containing section 734's language); Foraker Act, ch. 191 § 14, 31 Stat. 77 (1900) (containing language similar to section 734). Now found in FRA section 734 and central to the issue before us, that language has defined the application of federal law to Puerto Rico since 1900. *See, e.g., P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988) (relying on section 734 to delineate the test for federal preemption of Puerto Rican law).

The Fair Labor Standards Act protects employees from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living," 29 U.S.C. § 202(a). The Act prescribes minimum wage and overtime rates for employees either engaged in interstate commerce or working for employers engaged in interstate commerce. *Id.* §§ 206, 207. In order "[t]o encourage employees to enforce their

FLSA rights in court, and thus to further the public policies underlying the FLSA," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 n. 16, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), FLSA section 16(b) provides that "[a]n action to recover" for violations of the Act's minimum wage, overtime, and non-retaliation provisions "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b). Congress added the parenthetical reference to public agencies—defined to include both states and territories—to "overcome . . . the Supreme Court [decision] in *Employees of the Department of Public Health v. Missouri* (411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251, April 18, 1973) which stated that Congress had not explicitly provided . . . [that] State and local employees could bring an action against their employer in a Federal court under section 16." H.R.Rep. No. 93-913, at 45 (1974); *see also* 29 U.S.C. § 203(x) (defining "[p]ublic agency" to include "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State"); *id.* § 203(c) (defining "State" to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States").

In *Seminole Tribe*, however, the Supreme Court held that Article I gives Congress no authority to divest States of sovereign immunity from suit in federal court. *Seminole Tribe*, 517 U.S. at 72-73, 116 S.Ct. 1114. And three years later in *Alden*, which involved FLSA section 16(b), the Court extended *Seminole Tribe* to suits brought in state court. *Alden*, 527 U.S. at 754, 119 S.Ct. 2240. Taken together, *Seminole*

Tribe and *Alden* mean that state employees no longer have any "court of competent jurisdiction," 29 U.S.C. § 216(b), in which to sue their employers for FLSA violations.

Appellee, Emma Rodriguez, filed suit in the United States District Court for the District of Columbia under FLSA section 16(b), alleging that the Puerto Rico Federal Affairs Administration (PRFAA), an executive agency of the Commonwealth of Puerto Rico, violated the FLSA by underpaying her and then retaliating against her after she complained. PRFAA moved to dismiss, arguing that *Seminole Tribe* and *Alden* entitled it to sovereign immunity from FLSA suits. The district court denied the motion, explaining that "[i]t is for Congress, and not this court, to decide, in light of *Seminole Tribe* and its progeny," whether Puerto Rico should be subject to suit under section 16(b) when States are not. *Rodriguez v. P.R. Fed. Affairs Admin.*, 338 F.Supp.2d 125, 130 (D.D.C.2004). PRFAA then moved under section 1292(b) to certify the sovereign immunity question for interlocutory appeal. *See* 28 U.S.C. § 1292(b) (allowing district courts to certify for interlocutory appeal any "controlling question of law as to which there is substantial ground for difference of opinion and [if] an immediate appeal . . . may materially advance the ultimate termination of the litigation"). The district court granted the motion, *Rodriguez v. P.R. Fed. Affairs Admin.*, No. 03-2246 (D.D.C. Dec. 13, 2004), and PRFAA timely filed a petition for permission to appeal. Fed. R.App. P. 5(a) (requiring that parties petition for permission to bring discretionary appeals "within the time specified by the statute or rule authorizing the appeal"). Because the district court properly certified the issue, and because both parties encourage us to hear this appeal, we

grant PRFAA's petition. The federal government has intervened to defend the constitutionality of section 16(b) as applied to Puerto Rico.

II.

PRFAA argues that section 734 enunciates a "default rule" under which courts must construe federal statutes to apply equally to Puerto Rico and the fifty States unless Congress expressly provides otherwise. For additional support, PRFAA relies on the Compact, arguing that "no court should lightly infer that Congress has broken faith with its solemn undertaking in the Compact [to reaffirm and bolster Puerto Rico's sovereign immunity] in the absence of a clear statement of intent by the Congress." Appellants' Br. 7. Because *Seminole Tribe* and *Alden* bar section 16(b) suits against States, and because nothing in the FLSA reveals any congressional intent to treat Puerto Rico differently with respect to private section 16(b) suits, PRFAA argues that the district court should have dismissed Rodriguez's complaint. We agree.

FRA section 734 provides that "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734. Here, we consider how to apply this mandate to FLSA section 16(b), which allows employees to maintain private actions against any employer, "including a public agency." 29 U.S.C. § 216(b). Section 3(x) defines "public agency" to include the government of a "State," 29 U.S.C. § 203(x), and section 3(c) defines a "State" to include "any State" or "any Territory," 29 U.S.C. § 203(c). If, as Rodriguez argues,

section 16(b) continues to authorize such actions against Puerto Rico, then the provision would have a different "force and effect in Puerto Rico [than it does] in the United States": in Puerto Rico a "State"—as defined by the statute—can be sued, while in the United States, after *Seminole Tribe* and *Alden*, a "State" cannot. The only way to give section 16(b) "the same force and effect in Puerto Rico as in the United States" is to hold, as PRFAA urges, that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits.

The district court is certainly correct that "[i]t is for Congress, and not this court," to decide what to do with section 16(b) given *Seminole* Tribe and *Alden*. *Rodriguez*, 338 F.Supp.2d at 130. Indeed, as Rodriguez points out, *Seminole Tribe* itself says that courts are not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the provision] was beyond its authority." *Seminole Tribe*, 517 U.S. at 76, 116 S.Ct. 1114. Here, however, we need not "rewrite the statutory scheme" to reflect what "we think Congress might have wanted had it known" that section 16(b)'s private right of action could no longer be applied to States. FRA section 734, though originally enacted almost a century before *Seminole Tribe* and *Alden*, tells us exactly how to apply section 16(b) to Puerto Rico now that, by virtue of those two decisions, its private right of action has become inapplicable to States. Specifically, section 16(b)'s private right of action must have the same "force and effect" against "State" agencies in Puerto Rico, namely no force or effect at all. *See* 29 U.S.C. § 203(c) (defining "State" to include territories for FLSA purposes).

Appendix A

The First Circuit, the court most expert on Puerto Rico's status, agrees. In *Jusino Mercado*, also a section 16(b) suit against Puerto Rico, the First Circuit concluded:

> [G]iven the language of the FLSA, the context in which Congress amended it to reach public agencies, and the guidance provided by the Federal Relations Act, reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict what we discern to be Congress's manifest intent. To harmonize our reading of the statute with this intent and to maintain the parallelism that Congress sought to achieve, we construe the FLSA as failing to overcome Puerto Rico's immunity.

Jusino Mercado v. Puerto Rico, 214 F.3d 34, 44 (1st Cir.2000).

Rodriguez's arguments to the contrary are unpersuasive. First, twisting section 16(b)'s plain language, she argues that "[a]t most, the [FRA] holds that the FLSA *has* applicability in Puerto Rico [because the] statute [is] applicable in the states." Appellee's Br. 21. But, she continues, section 734 does not accord to Puerto Rico the same defense to individual claims in federal court that the U.S. Constitution provides States. Although it is true that the FLSA *applies* both in the United States and in Puerto Rico, Congress commanded that section 16(b) apply to Puerto Rico according to its *force* and *effect* in the United States. After *Seminole Tribe* and *Alden*, section 16(b) no longer has the force and effect Congress purported to give it: States now enjoy immunity from private

rights of action. Section 734's "same force and effect" command thus requires that we accord the same immunity to Puerto Rico.

Pointing out that Congress intended the FLSA to apply broadly to "all employees within the scope of the Act," *United States v. Rosenwasser*, 323 U.S. 360, 363, 65 S.Ct. 295, 89 L.Ed. 301 (1945), Rodriguez next argues that "under the FLSA's rules of interpretation[ ], there can be no implied exemptions to the FLSA," Appellee's Br. 22. But Rodriguez provides no citation to any FLSA "rules of interpretation," and we are unaware of any such rules. More important, our ruling today creates no "implied exemption" to the FLSA, but merely follows Congress's express direction to give "[t]he laws of the United States . . . the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734.

Next, Rodriguez urges us to ignore section 734 altogether since "an implicit 'default rule' cannot be said to override explicit language in a statute that clearly expresses a contrary position. Because Congress made Puerto Rico liable under the FLSA specifically, the default rule cannot trump Congress's specific instructions." Appellee's Br. 22. But neither section 16(b) nor the definitional terms it incorporates "specifically" refer to Puerto Rico. FLSA section 3(c) broadly defines the term "State"—a category of "covered employers"—to include "any State of the United States or the District of Columbia or any *Territory*." 29 U.S.C. § 203(c) (emphasis added). By comparison, section 734 applies expressly to Puerto Rico. Accordingly, because the canons of statutory construction require that the specific govern the general, instead of ignoring section 734, we must apply

section 16(b) (the more general of the two provisions) as directed by section 734, giving it the same "force and effect in Puerto Rico as in the United States."

Last, assuming for argument's sake that the "default rule" applies, Rodriguez argues that it does "not bar this suit, because there is a rational basis for treating Puerto Rico differently from the states—namely that the states have constitutional sovereign immunity . . . and Puerto Rico does not." Appellee's Br. 22. The fact that Congress may have had a rational basis for treating Puerto Rico differently from States, however, is irrelevant given that it expressly chose not to do so for purposes of section 16(b) private enforcement actions. 29 U.S.C. § 216(b) (providing "[a]n action to recover" for FLSA violations "may be maintained against any employer (including a public agency)"; *id.* § 203(x) (defining "[p]ublic agency" to include "any agency of . . . a State"); *id.* § 203(c) (defining "State" to include "any State" and "any Territory"). Because of this, and because of section 734's "same force and effect" command, we have no basis for treating Puerto Rico differently from the fifty States.

We reverse the district court's decision and remand with instructions to dismiss the complaint.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 30, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-2246 (JR)

EMMA RODRIGUEZ,

Plaintiff,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *et al.*,

Defendants.

MEMORANDUM

Plaintiff brings this claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"). She alleges that defendants, an executive agency of the Commonwealth of Puerto Rico and supervisory employees of that agency, violated FLSA by 1) failing to pay her for all hours that she worked for defendants; 2) failing to pay her overtime wages for work over 40 hours per week; and 3) retaliating against her by terminating her employment when she complained about defendants' failure to pay proper wages.

Appendix B

Defendants have moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Puerto Rico Federal Affairs Administration is immune from this suit under principles of sovereign immunity and that retaliation protection is not available under FLSA for plaintiffs who have made internal complaints about alleged violations of FLSA. For the reasons set forth below, defendants' motion must be denied.

Sovereign Immunity

Defendants claim that this court is without jurisdiction to hear this complaint because the PRFAA, an agency of the Commonwealth of Puerto Rico, is immune from private suits for damages under the doctrine of sovereign immunity.[1] Defendants also assert that employees of the agency enjoy derivative immunity. (Obviously, if the PRFAA is not immune, which it is not, its employees also lack immunity.)

FLSA, as amended in 1974, permits private suits for monetary damages against "any employer (including a public agency) in any Federal or State court. . . ." 29 U.S.C. § 216(b). "Public agency" is defined to mean: "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency." 29 U.S.C. § 203(x). "State" is defined to mean: "any State of the United States or the District of Columbia or any Territory or possession of

1. It appears to be conceded that the PRFAA shares whatever sovereign immunity Puerto Rico has.

the United States." 29 U.S.C. § 203(c). It is not disputed that Puerto Rico is a territory. *See generally Harris v. Rosario*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (finding Congress has power over Puerto Rico under the Territory Clause of the Constitution, U.S. Constit. art. IV, § 3, cl. 2); *Americana of P.R., Inc. v. Kaplus*, 368 F.2d 431, 433-36 (3rd Cir.1966), *cert. denied*, 386 U.S. 943, 87 S.Ct. 977, 17 L.Ed.2d 874 (1967) (providing extensive analysis of Puerto Rico's position under the Territory Clause). The current FLSA language was written in 1974 specifically "to make clear the right of individuals employed by state and local governments and political subdivisions to bring private actions to enforce their rights and recover back wages under [FLSA]" in light of judicial limitations on this right. H.R. Rep. 93-913, at 41 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2850.

In a series of recent sovereign immunity cases beginning with *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the scope and underpinnings of state sovereign immunity and the Eleventh Amendment[2] have shifted dramatically, radically altering prior understandings of the ability of private parties to sue states for monetary

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2. Sovereign immunity of the type addressed in this case is often referred to as "Eleventh Amendment immunity." However, the Supreme Court has recently indicated that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In light of this opinion, and the Eleventh Amendment's explicit reference to "states" and not territories, *see* U.S. Const. amend. XI, the general term "sovereign immunity" is most appropriate for this opinion.

damages under federal law. As part of this shift, a number of Circuit courts have ruled that states are immune from wage and overtime suits in federal court under 29 U.S.C. § 216(b). *See, e.g., Mills v. Maine*, 118 F.3d 37, 41-50 (1st Cir.1997); *Raper v. Iowa*, 115 F.3d 623 (8th Cir.1997); *Aaron v. Kansas*, 115 F.3d 815 (10th Cir.1997). It seems a reasonable prediction that the D.C. Circuit would follow this lead, especially in light of *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), holding Maine immune from an overtime suit in *state* court under 29 U.S.C. § 216(b).[3]

The question, then, is whether Puerto Rico enjoys the same sovereign immunity from suits under federal law as the states. The most recent Supreme Court opinion to address the issue explicitly withheld decision. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 n. 1, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (noting that First Circuit law that Puerto Rico is a state for Eleventh Amendment purposes had not been challenged and thus declining to rule on the issue). Defendants point out, correctly, that virtually every court that has addressed the

3. Additionally, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), the Court found that states were immune from similar suits in federal court under the Age Discrimination in Employment Act (ADEA), enforced through same provision of FLSA that is at stake here—29 U.S.C. § 216(b). Note that the Equal Pay Act provisions of FLSA present Fourteenth Amendment issues not relevant to general wage and overtime concerns, and may well abrogate state sovereign immunity. *See, e.g., Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir.2000), *cert. denied*, 533 U.S. 902, 121 S.Ct. 2241, 150 L.Ed.2d 230 (2001) (holding that Equal Pay Act validly abrogates state sovereign immunity).

issue has found Puerto Rico immune from suit in parallel with the states. With the notable exceptions discussed below, however, the cases declaring this immunity have either simply assumed the existence of immunity or ruled without discussion, citing to a somewhat tangled web of other cases that also provide no discussion. And none of them addresses the specific concerns that arise here, where it is Congress, and not a state or local government, that has created a cause of action that may impose liability upon Puerto Rico or one of its agencies. *See, e.g., Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 39 (1st Cir.1999) (summary citation to *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935 (1st Cir.1993)); *Metcalf & Eddy, Inc.*, at 939 n. 3 (citation with no discussion to four other cases that also offer no substantial discussion of the point); *Ezratty v. Puerto Rico*, 648 F.2d 770 n. 7 (1st Cir.1981) (Breyer, J.) (citation with no discussion to two other cases); *Salkin v. Puerto Rico*, 408 F.2d 682, 683 (1st Cir.1969) (assumption that Puerto Rico is covered by "the well established federal deference to the right of a sovereign power to withhold all consent to suit"); *Felix v. Haggerty*, No. 80-1075, 1980 WL 326, at *1 (D.D.C. Oct. 21, 1980) (summary citation to two other cases).

At the bottom of this pile of authorities lies a 1913 Supreme Court case, *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507. In *People of Porto Rico*, the Court noted that "aside from the existence of some exception, the government which [Congress in] the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Id.* at 273, 33 S.Ct. 352. If Congress had allowed

Puerto Rico to be sued, the Court went on to conclude, such suits would be permissible. *Id.* at 274-77, 33 S.Ct. 352.

What Congress giveth, Congress may take away, fully consistent with the Territory Clause of the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Constit. art. IV, § 3, cl. 2. *See also Harris*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (holding that under the Territory Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions"). There have been many changes since 1913 in Puerto Rico's status and the doctrine of sovereign immunity. However, defendants do not dispute the proposition that Congress has the power to abrogate any sovereign immunity that Puerto Rico may possess with regard to a Congressionally-created cause of action such as FLSA, and that it exercised that power when it amended the FLSA in 1974.

This understanding of Puerto Rico's sovereign immunity as being different from that of the states, and subject to Congressional limitation, is fully consistent with the Supreme Court's recent discussions on the nature of state sovereign immunity in *Alden v. Maine*:

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either

> literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional amendments.

527 U.S. at 713, 119 S.Ct. 2240. Given Puerto Rico's history as a territory, and not a state, Puerto Rico cannot be said to have constitutional sovereign immunity. Thus there is no reason to assume that whatever sovereign immunity it might possess is parallel to that of the states or that it is not subject to Congressional restriction under the Territory Clause.

Acknowledging all of the above arguments, defendants continue to maintain that Puerto Rico is immune from the present FLSA suit. They rely for this argument almost exclusively on *Jusino Mercado v. Puerto Rico*, 214 F.3d 34 (1st Cir.2000), a case that grants Puerto Rico sovereign immunity from private suit under the general wage and overtime provisions of FLSA.

Jusino Mercado's holding is grounded in statutes, not the constitution. *Id.* at 44. The opinion relies heavily on the Puerto Rican Federal Relations Act, 48 U.S.C. § 734, for the proposition that "[t]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States. . . ." Additionally, the First Circuit noted that Congress intended Puerto Rico's commonwealth status " 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.' " *Jusino Mercado*, 214 F.3d at 42 (quoting *Examining Bd. of Eng'rs, Architects & Surveyors*

v. Flores de Otero, 426 U.S. 572, 594, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976)). Thus, the First Circuit determined that, "long before Congress enacted the relevant provision of FLSA, it had put firmly in place a default rule: statutes of general application would apply equally to Puerto Rico and to the fifty states *unless* Congress made specific provision for differential treatment." *Id.* (emphasis in original). Alternatively, Puerto Rico could still be treated differently if there were a "compelling reason." *Id.*

So far, so good. But then the First Circuit came face-to-face with the unambiguous language of the 1974 amendments to FLSA that subjected Puerto Rico—and the states—to liability in private lawsuits for monetary damages. 29 U.S.C. § 216(b). The unsatisfying and unpersuasive result was this:

> To sum up, there is absolutely no evidence that Congress intended to treat Puerto Rico differently than the fifty states for purposes of the FLSA's enforcement provision. Nor have the appellants identified any compelling policy reasons that might propel us towards such a result. Hence, in accordance with 48 U.S.C. § 734, we conclude that *the language in the FLSA that courts have deemed insufficient to abrogate states' immunity is equally insufficient to undermine Puerto Rico's immunity.* When Congress provided for suits by individual employees against public agencies "in any Federal or State court of competent jurisdiction," it did not intend for that jurisdiction to encompass suits against Puerto Rico more readily than suits against the states. Indeed, it is

> inconceivable to us that Congress would have chosen to invoke the Territorial Clause to impose the FLSA on Puerto Rico had it known that it could not impose an equivalent burden on the fifty states.

Id. at 44 (emphasis added). Among the many problems with this argument, the most important is the First Circuit's refusal to deal head-on with the *reason* why the 1974 amendments to FLSA have been "deemed insufficient to abrogate states' immunity." The rationale of *Seminole Tribe* and its progeny is grounded in the constitution. The constitution does not limit the power of Congress to abrogate Puerto Rico's sovereign immunity. Instead, it actually empowers Congress to do so. The First Circuit's inability to conceive that Congress would have chosen to impose FLSA on Puerto Rico had it known that it could not do so for the states, and its purported certainty about what Congress meant when it enacted the 1974 amendments, amount to, I respectfully suggest,[4] (i) speculation, (ii) about legislative intent, (iii) in the face of unambiguous statutory language requiring a different result.

The standard, traditional canon of severability is that "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be

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4. I accept the defendants' suggestion that deference is owed to the First Circuit's views on sovereign immunity for Puerto Rico, since the First Circuit is the court primarily entrusted with issues relating to Puerto Rico. Rulings of the First Circuit are not binding upon this court, however.'

dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). Nobody has suggested that "what is left" here—possible liability under FLSA for Puerto Rico, but not for states—is not fully "operative as a law." We may presume that Congress did not in fact anticipate that its power to apply FLSA to the states would be curtailed, but nobody can say how Congress would have shaped the FLSA amendments if it had been so prescient, nor am I free to decide the issue presented here on the basis of my own belief as to what Congress would have done. I can say what Congress did do, which was permit private law suits for monetary damages against Puerto Rico under FLSA. Congress had the power to do this. It is for Congress, and not this court, to decide, in light of *Seminole Tribe* and its progeny, what to do next.

Retaliation For Internal Complaints Under FLSA

FLSA makes it illegal "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding. . . ." 29 U.S.C. § 215(a)(3). Plaintiff's complaint alleges that she "repeatedly requested proper payment of her overtime and other wages, but did not receive them," Pltf.'s Compl. ¶ 23, and that she was "terminated shortly after she complained to defendants regarding their failure to properly pay her." *Id.*, ¶ 24.

Defendants, taking the plain language side of the argument in this part of the case, argue that FLSA's anti-

retaliation language does not protect employees from retaliation for making internal complaints to an employer about possible FLSA violations. The Second and the Fourth Circuits have sustained that view. *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (4th Cir.2000); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2nd Cir.1993). Both courts have drawn conclusions favorable to defendants' view of FLSA's narrow language by contrasting it with the much broader language of Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000e et seq. ("Title VII"). *Ball*, 228 F.3d at 364; Lambert, 10 F.3d at 55.[5] Congress knows how to be broad when it wants to be broad.

Seven other circuits have found that FLSA does bar retaliation for at least some purely internal complaints. *See, e.g., Valerio v. Putnam Associates Inc.*, 173 F.3d 35 (1st Cir.1999); *Brock v. Richardson*, 812 F.2d 121 (3rd Cir.1987); *EEOC v. Romeo Cmty. Schools*, 976 F.2d 985 (6th Cir.1992); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir.1975); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir.1999); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir.1984); *EEOC v. White & Son Enter.*, 881 F.2d 1006, (11th Cir.1989). These opinions exhibit a range of rationales, but most of them note important Supreme Court decisions indicating that FLSA should not be interpreted too narrowly and stressing the importance of substantive anti-retaliation protection. *See, e.g., Valerio*, 173 F.3d at 41-44; *White & Son Enterprises*, 881 F.2d at 1011-12;

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5. Under Title VII, it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

see also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Those interpretational guides have led those courts to find that FLSA's language does cover internal complaints. *See, e.g., Lambert*, 180 F.3d at 1004 (finding that "filed any complaint" could be interpreted to encompass internal complaints, especially given the common labor practice of "filing" internal grievances with employers).

This issue appears to be one of first impression in the D.C. Circuit. It should not be decided on this record. The narrow holdings of the Second and Fourth Circuits are more consistent with FLSA's language, but we do not know enough to apply that language with precision. Plaintiff alleges only that she was fired after complaining to her employer about alleged violations of FLSA. She does not indicate whether or not she filed any complaint with anyone (internal or external), instituted any proceeding, or testified or was about to testify in any proceeding. Since I cannot say that there is no version of the facts upon which plaintiff could prevail on her claim, the prudent course is to allow further development of the record.

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An appropriate order accompanies this memorandum.

ORDER

For the reasons stated in the accompanying memorandum, defendant's motion to dismiss is **denied**.